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**IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

UTAH VAPOR BUSINESS ASSOCIATION,
INC., a Utah nonprofit corporation, *et al.*,

Plaintiffs,

vs.

STATE OF UTAH, *et al.*,

Defendants.

**NOTICE OF OBJECTION TO
IMPROPER ARGUMENT IN STATE'S
REPLY BRIEF**

Case No. 2:24-cv-00950-DBB-JCB

Judge David Barlow
Magistrate Judge Jared C. Bennett

Plaintiffs Utah Vapor Business Association, Inc. and The Smoke House, LLC respectfully object to the severability argument contained on pages 9-12 of the State’s Reply Brief, on the grounds that it exceeds the scope of the Court’s February 13, 2025, Order for Supplemental Briefing, *see* Dkt. 45, and was not argued in the State’s original Supplemental Brief, *see* Dkt. 50.

ARGUMENT

The Court should decline to consider the severability argument contained on pages 9-12 of the State’s Reply Brief for at least two reasons. *First*, on February 13, 2025, the Court issued an order limiting supplemental briefing to “potentially binding Supreme Court and Tenth Circuit decisions on the *Burger* criteria,” and whether pending legislation in the Utah Senate and Utah House “creates a prudential mootness or related issue.” *See* Dkt. 45. The Court did not ask the parties to address whether the inspection provisions are severable from S.B. 61. Courts routinely refuse to consider arguments exceeding the scope of a supplemental briefing order. *See Doe v. Heil*, 533 F. App’x 831, 836 n.4 (10th Cir. 2013) (declining to consider a “late-blooming” argument because it “exceed[ed] the scope of [the Court’s] supplemental briefing order” (citation omitted)); *Fucci v. Bowser*, No. 2:20-CV-00004, 2023 WL 6391506, at *20 (D. Utah Oct. 2, 2023) (rejecting supplemental filings that were “unauthorized by the rules and far exceed[ed] the scope of the limited supplemental briefing permitted by the court”); *United States v. Close*, 202 F. App’x 950, 951 (9th Cir. 2006) (same).

Second, the State raised the severability issue for the first time in its Reply Brief, depriving Plaintiffs of the chance to respond to the argument.¹ That is improper and constitutes waiver of the

¹ To be sure, in its Supplemental Brief, the State referred the Court back to its Opposition to Plaintiffs’ Motion for a Preliminary Injunction, which addressed severability in only a cursory

argument. *See SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1226 (10th Cir. 2009) (“[T]he general rule in this circuit is that a party waives issues and arguments raised . . . for the first time” in a reply brief).

CONCLUSION

For the foregoing reasons, Plaintiffs object to the improper argument contained on pages 9-12 of the State’s Reply Brief and respectfully request that the Court decline to consider it.

DATED: March 10, 2025

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fashion. *See* State Supp. Brief at 8 n.5 (citing Dkt. 32 at 26 n.59). But the State advanced no developed argument on severability until its most recent Reply Brief. *See id.*

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